Supreme Court of the United States

OCTOBER TERM, 1949

No. 34

G. W. McLAURIN,
Appellant,
v.
OKLAHOMA STATE REGENTS FOR HIGHER EDUCATION, BOARD OF REGENTS OF UNIVERSITY OF OKLAHOMA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AS *AMICUS CURIAE*

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae,

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The American Civil Liberties Union, which is devoted to the furtherance of the civil rights guaranteed by the Constitution of the United States, submits this brief in the belief that respondents' action in connection with the appellant constitutes a violation of that provision of the 14th Amendment to the Constitution of the United States which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." We believe that the principles expounded herein are equally applicable to *Henderson* v. *United States*, No. 25 and *Sweatt* v. *Painter*, No. 44 now before this Court.

Statement

Appellant, a Negro, has been subjected to restrictions which are not similarly placed upon white students. The appellant is a graduate student seeking his doctorate in education. Only under the primary compulsion of this Court was he finally admitted to the University of Oklahoma. He may listen to the lectures of the instructors, but he must sit at a special desk, *apart* from all the others in a doorway of the classroom; he may use the facilities of the library, but only at a desk—*apart*—on the mezzanine; he may eat in the school cafeteria, but only at a different time and at a table—*apart*—from all the others—for his use *alone*.

This brief is directed to the question of whether the Equal Protection clause of the 14th Amendment prohibits a state from segregating Negroes from Whites.

Segregation of Negroes from Whites Violates the Equal Protection Clause.

Upon one principle all the opinions which have been written by the Court upon the subject of segregation since the inception of the 14th Amendment have agreed. That principle is that no person may be stamped with a badge of inferiority by reason of his race or color. Indeed, we may take as our text for this principle the very case which is the fountain of the respondents' authorities: *Plessy* v. *Ferguson*, 163 U. S. 537. Mr. Justice Brown's opinion explicitly recognized that Equal Protection would not permit a State to "stamp" the Negroes "with a badge of inferiority." 163 U. S. at 551. Thus, the Court indicated that a state could not enact laws requiring Negroes "to walk upon one side of the street, and white people

upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors." 163 U. S. at 549. That principle found early expression after the 14th Amendment. As stated in *Strauder* v. *West Virginia*, 100 U. S. 303, 306, a case condemning systematic exclusion of Negroes from juries, the 14th Amendment is one of the three Constitutional provisions "having a common purpose; namely, securing to a race recently emancipated, * * * the enjoyment of all the civil rights that under the law are enjoyed by white persons."

Before the Civil War Negroes were slaves, and the race had long been regarded, officially and unofficially, as inferior and subject. But the 13th, 14th, and 15th Amendments prohibited the States from proceeding upon an assumption of the inferiority of Negroes. By the equal protection clause the Negroes were given "a positive immunity, or right, most valuable to the colored race, —the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, *implying inferiority in civil society.*" *Strauder* v. *West Virginia*, *supra*, 307-308. (Italics supplied.) The States were prohibited from taking such action with respect to the Negroes as would be "a brand upon them, affixed by the law, *an assertion of their inferiority*, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." *Strauder* v. *West Virginia*, *supra*, 368. (Italics supplied.)

Segregation of Negroes in any fashion can only be understood as imposing upon them a badge of inferiority. Myrdal, *An American Dilemma*, vol. I, pp. 615, 640; Johnson, *Patterns of Negro Segregation*, p. 3; Fraenkel,

Our Civil Liberties, p. 201; Dollard, *Caste and Class in a Southern Town*, pp. 349-351; Note, 56 Yale L. J. 1059, 1060; Note, 29 Columbia L. Rev. 629, 634; Note, 39 Columbia L. Rev. 986, 1003. Segregation "brands the Negro with the mark of inferiority and asserts that he is not fit to associate with white people." *To Secure These Rights*, Report of the President's Committee on Civil Rights, p. 79.

What more explicit "brand" upon appellant, what clearer "assertion" of his "inferiority", could there be than the segregation within the University of Oklahoma practiced upon this appellant? Segregation in itself serves no rational purpose other than that found in the frequently asserted inferiority of the Negro. That purpose this Nation and this Court must never condone.

The case of *Plessy* v. *Ferguson*, 163 U. S. 537, 551, in which segregation of the races in separate railroad cars was upheld, while recognizing that the State could not "stamp" the Negroes "with a badge of inferiority", held that "solely because the colored race chooses to put that construction upon it" segregation does not imply inferiority, for the dominant whites and the state which they control make no such assumption. This astonishing assumption of fact of the *Plessy* case that segregation does not imply the inferiority of the Negroes is demonstrably without basis.

So completely is the inferior position of the Negro minority guaranteed by legal segregation that numerous Southern state courts have held that the word "Negro" or "colored person" when applied to a white person gives rise to a cause of action for defamation, a doctrine which has also been upheld by a federal court.

In *Stultz* v. *Cousins*, 242 F. 794 (C.C.A. 6th, 1917), it was held that a right of action for libel *per se* existed where a defendant published a false statement that the

plaintiff was a man of "one-fourth" Negro blood. The Court declared (p. 797):

> "Whatever be the rule as to spoken words, the authorities establish that the publication of a writing containing such a statement in respect to a white man is libelous *per se*, at least in a community in which marked social differences between the races are established by law and custom."

In *Flood* v. *News and Courier Co.*, 71 S. C. 112, 50 S. E. 637 (1905), a South Carolina court ruled that the right to recover resulting from the publication by a newspaper of a statement about a white man that he was a Negro was in no way affected by the adoption of the 13th and 14th Amendments. In sustaining its position the Court argued at page 639:

> "When we think of the radical distinction subsisting between the white man and the black man, it must be apparent that to impute the condition of the Negro to a white man would affect his (the white man's) social status, and in case any one publish a white man to be a Negro, it would not only be galling to his pride, but would tend to interfere seriously with the social relation of the white man with his fellow white men."

And the Georgia court, in 1907, deciding the case of *Wolfe* v. *Georgia Railway Electric Co.*, 2 Ga. App. 499, 58 S. E. 899, took judicial notice of the fact that to call a white man a Negro, even in good faith or through an innocent mistake, constituted an actionable wrong. The Court asserted at page 902:

> "It is a matter of common knowledge that, viewed from a social standpoint, the Negro race is in mind and morals inferior to the Caucasian. The record of each from the dawn of historic times denies equality."

Referring to the "intrinsic differences" between the races the Court observed that these differences "are recognized in this state by the laws against intermarriage, by the laws for the separation of passengers by common carriers, separate schools, etc."

In similar holding the highest court of Oklahoma declared in *Collins* v. *Oklahoma State Hospital*, 76 Okla. 229, 184 P. 946, 947 (1919):

> "In this state, where a reasonable regulation of the conduct of the races has led to the establishment of separate schools and separate establishment of separate schools and separate coaches, and where conditions properly have erected insurmountable barriers between the races when viewed from a personal and social standpoint, and where the habits, the disposition, and characteristics of the race denominate the colored race as inferior to the Caucasian, it is libelous *per se* to write of or concerning a white person that he is colored. Nothing could expose him to more obloquy, or contempt, or bring him into more disrepute, than a charge of this character."

In *Anderson* v. *Pantages Theatre Co.*, 114 Wash. 24, 194 P. 813 (1921), where a Negro was ejected from a theatre upon refusal to sit in the balcony, where he was assigned solely because of race, the Washington court in upholding recovery described the injury resulting from such discrimination as an "assault upon the person, and in such cases the personal indignity inflicted, the feeling of humiliation and disgrace engendered, and the consequent mental suffering are elements of actual damages for which an award is given" (p. 816).

Where white persons have been compelled to ride in Negro coaches the courts have deemed the humiliation and mortification so great as to warrant the award of

amages. *Louisville and N. R. Co. v. Ritchel*, 148 Ky. 01, 147 S. W. 411 (1912); *Missouri K. & T. Ry. Co. of Texas v. Ball*, 25 Tex. Civ. App. 500, 61 S. W. 327 (1901); *Chicago, R. I. & P. Ry. Co. v. Allison*, 120 Ark. 54, 178 S. W. 401 (1915).

There have been subsequent judicial expressions which have followed the *Plessy* case but these cases failed to examine its erroneous factual assumption that segregation is no assertion of inferiority. *Gong Lum v. Rice*, 75 U. S. 78, and cases cited. In each case in which segregation has been upheld there has been no consideration or inquiry into whether segregation of itself implies inferiority.

Can Oklahoma contend today that the official segregation of appellant is based any less on a notion of inferiority than would be a brand or a chain? The Equal Protection clause loosed the shackles and covered over the scars of the brands which had been inflicted upon "any person." No less does that clause shield appellant from the brand of segregation.

The judgment should be reversed.

Respectfully submitted,

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